No. 2017

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

VICTOR VON ARX,

Plaintiff in Error,

vs.

A. J. BOONE,

Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

Z. R. CHENEY,
Attorney for Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2017.

VICTOR VON ARX,

Plaintiff in Error,

vs.

A. J. BOONE,

Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Brief of Defendant in Error.

BRIEF OF THE ARGUMENT.

Plaintiff in error seeks to reverse the judgment of the lower court upon the following assignments of error:

FIRST.

"The Court erred in ruling and holding that the proceedings in cause No. 667-A, entitled J. M. Jenne vs. Alex. Smallwood et al., were valid as against said Smallwood, and that the decree herein and proceedings thereunder devested Smallwood of the title to the property in controversy."

SECOND.

"The Court erred in directing the jury to return a verdict for the defendant."

THIRD.

"The Court erred in refusing to direct the jury to return a verdict for the plaintiff." (Rec. 98.)

In support of his first assignment of error, counsel, in the brief of his argument, says (Rec. 12): "There are two reasons why the title of Smallwood was not affected by such proceedings: First. The judgment, or decree, in cause No. 667-A is void. Second: Even if such decree were valid, the proceedings in question were insufficient to pass Smallwood's title to Ehrlich; and Ehrlich had no title to be affected by the judicial sale had in 1910 under the execution in Cause No. 667-A." First. Was the decree of the District Court, dated December 8, 1908, foreclosing the mortgage on the land described therein, void as to the defendant, Alex. Smallwood? The statute, chapter 4, section 46, Code of Civil Procedure for Alaska, provides: "The summons published shall contain the name of the court, and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication and the time within which the defendant is required to answer the complaint."

The summons published contained everything required by this statute. (Rec. 71.) The time within which defendant was required to appear is stated as follows: "You are hereby commanded to be and appear in the above-entitled court holden at Juneau in said Division and District, within thirty days after the completion of the period of publication of this summons. First Pub. May 2, 1908. Last Pub. June 13, 1908." It would seem that any man of average intelligence who is able to read the English language would have no difficulty in ascertaining the length of time allowed him to appear and answer

this summons. In stating that he must appear within thirty days after the completion of the period of publication and stating the date of the completion of the period of publication, it leaves no doubt in the defendant's mind that he must appear within thirty days after June 13, 1908. Counsel in his brief, page 22, says: "The summons directs the defendant to appear within thirty days from the completion of the period of publication. But what is that period? All that the summons reveals is that the order was made on April 23, 1908. But whether the period prescribed was six weeks, the minimum, or eight weeks, or three months, the recipient of the notice was left wholly in the dark." If the recipient of the notice would compute the time from May 2, 1908, to June 13, 1908, he would see some ray of light in the darkness in which counsel leaves him, and would discover the period of publication to be six weeks. If the defendant understands the time within which he must appear, it is immaterial whether he knows or is able to determine the exact *period* of time prescribed for publication. Furthermore, sec. 48 of Carter's Code of Civil Procedure for Alaska does not require the time prescribed in the order for publication to be stated except in personal service out of the District. It says: "When publication is ordered, personal service of a copy of the summons and complaint out of the District shall be equivalent to publication and deposit in the postoffice. In either case defendant shall appear and answer within thirty days after the completion of the period of publication. In case of personal service out of the District the sum-

mons shall specify *the time prescribed in the order for publication.*" The only question is: Can the words, "First Pub. May 2, 1908. Last Pub. June 13, 1908," be considered a part of the published summons being at the foot instead of in the body of the summons? (Rec. 71.) The Supreme Court of the State of Washington decided this question in the affirmative in 1904 in the case of Williams vs. Pittock, 77 Pac. 385. Quoting from page 387: "The petition further alleges that the summons was insufficient to confer jurisdiction, for the reason that it did not set out therein the date of the first publication, and was therefore too indefinite to inform the defendants therein named, or the appellants, when they were required to appear and defend the action. Respondent argues that a tax foreclosure is a special proceeding, governed by the special revenue statutes only, and that, inasmuch as those statutes do not specifically require that the date of the first publication of the summons shall be stated, it is therefore unnecessary. Subdivision 2 of section 1, c. 178, pp. 383, 384, Sess. Laws 1901, relates to the special tax procedure, and declares that service by publication of summons may be had. There is no requirement in such summons different from those described by the general statute. We therefore think the law of 1901 requires a reference to the general statute for a description of what the summons shall contain. That statute, as found in section 4878, 2 Ballinger's Ann. Codes & St., requires that the date of the first publication shall be named. It follows that a tax foreclosure publication summons shall state such date.

Such, in effect, was said by this Court in Thompson vs. Robbins, 32 Wash. 149, 72 Pac. 1043, and afterward approved in Smith vs. White, 32 Wash. 414, 73 Pac. 480. If it be true, therefore, that the summons in question did not disclose the date of its first publication, it was insufficient to confer jurisdiction. Immediately following the attorney's signature to the summons is the following: 'Date of First Publication, October 9th, 1902.' Appellants contend that the above words, not being in the body of the summons, are not contained therein within the meaning of the statute. They also argue that, since the words follow the signature of counsel, it does not appear that they were authorized by the plaintiff in the case; that they may have been placed there by the printer, or by someone else not representing the plaintiff, and by whose acts the plaintiff was not bound. The words were, however, in a conspicuous place, and where they must have been seen if the summons was read. It was the duty of the defendants in the action to presume that the correct date was stated, and to act accordingly. If it afterward developed that the date was incorrect, the diligence of the defendants would have saved them from any prejudicial consequences. The fact that the words followed the signature of counsel, we think, is immaterial. They conveyed as much information as if they had preceded the signature, and their location is analogous to that of the postoffice address of counsel which usually follows the signature upon the summons. In Wagnitz vs. Ritter, 31 Wash. 343, 71 Pac. 1035, it was held that section 4871, 2 Ballinger's Ann. Codes

& St., which contemplates that the postoffice address of the attorney shall be contained in the summons, was sufficiently complied with when such address followed the signature. It is true that section 4872 sets forth a form of summons which places the postoffice address after the signature, but the section descriptive of the summons contemplates that the statement as to the postoffice address shall be a part of the summons itself. The form section is a mere legislative construction of the meaning of the prior one to the effect that when the address follows the signature, it is sufficiently a part of the summons, and the case cited is a judicial approval of that construction. We think the essence of that construction is applicable to the subject matter here. The recital stating the date of the first publication was attached immediately at the conclusion of the summons. One could not, with ordinary care, have read the entire summons without seeing this recital, and we think it should be held to have been a part of the summons. Nothing short of a substantial departure from the statutory requirements for a summons should be held to be fatal to a proceeding under it, and, unless it is clear that a defendant has been prejudiced, the variation in form is not such substantial departure. Shinn vs. Cummins, 65 Cal. 97, 3 Pac. 133. To the same effect is Ralph vs. Lomer, 3 Wash. St. 401, 28 Pac. 760. We are unable to see that the defendants in the action were prejudiced by the form of this summons. We therefore conclude that in both particulars discussed by appellants the summons was sufficient to confer

jurisdiction." See, also, McFarlane vs. Cornelius, 43 Or. 513; also reported in 73 Pac. 325.

North Pacific Cycle Co. vs. Thomas, 38 Or. 307, the Court say: "The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that he must appear within the time and at a place named and make such defense as he has, and in default of his so doing, that judgment will be taken against him in a sum designated or for the relief specified. If the summons actually issued accomplishes these purposes it should be held sufficient to confer jurisdiction, though it may be irregular in not containing other statements required by statute. If, on the other hand, it is wanting in these essential particulars, it will generally fail to give the Court jurisdiction. Freeman on Judgments, page 126. Judge Van Fleet in his recent very excellent work on Collateral Attack, in discussing this question, says: 'It being impossible to avoid errors, and the law having prescribed a method of correction by motion to quash or set aside the process, it would seem, on principle, that, where the process is sufficient to inform the person that a proceeding has been instituted against him in a specified tribunal, that method ought to be exclusive.' This is the rule I believe to be established by the authorities considered in section 129, supra. Van Fleet, Collateral Attack, section 347."

AUTHORITIES CITED BY PLAINTIFF.

Counsel for the plaintiff cites the following cases from the State of Washington:

Thompson vs. Robbins, 72 Pac. 1043.

Owen vs. Owen, 84 Pac. 606.

Baur vs. Widholm, 95 Pac. 277.

These cases require only passing notice. They all arose under the Revenue Act of the State for collection of taxes. The judgment in each case was attacked by direct proceedings, not collaterally as in the case at bar. The summons in each case was held void because it did not state what the statute required, viz., the date of the first publication. The case of Dolan vs. Jones, 79 Pac. 640, is to the same effect. I fail to see the application of these decisions to the case now before the Court, however. In perusing the decision in Dolan vs. Jones we find language that is applicable on another phase of this case as follows: "The first question raised by the respondents is that this is an action to quiet title, and, inasmuch as the appellant is not in possession and the lots are not vacant or unoccupied, the Court had no jurisdiction, and the action could not be maintained. We do not think that this is an action to quiet title, as claimed by the respondents. The reason why a person cannot maintain an action to quiet title to lands in the possession of another is that the party out of possession has a full and complete remedy in an action at law to recover possession. The appellant here had no such remedy. In an action at law to recover possession he would be concluded by the tax judg-

ment and sale, *which he could not attack collaterally.* The only remedy open to the appellant was either to move directly in the tax foreclosure case to vacate the tax judgment or to bring an independent suit in equity for that purpose. He chose the latter course, and we hold that he is properly before the court."

The case of Odel vs. Campbell, 9 Or. 278, might be entitled to great weight, coming, as it does, from a State which has the same statute as that of Alaska, provided the decision had any bearing upon the question now before the Court. The gist of the decision is simply to the effect that where the statute provides that the summons published shall contain the date of the order for service by publication, a summons published that did not contain such date is void.

Swift vs. Meyers, 37 Fed. 37, was decided under an entirely different state of facts than exist in the case at bar. The statute required the summons to be delivered "to some person of the family at the dwelling-house or usual place of abode of the defendant." The return stated that the summons was left with a member of the family over the age of fourteen years at his (defendant's) usual place of abode in said (Linn) county. Upon this return the Court held the service insufficient because it did not show the place was the usual place of abode in the *State,* the Court saying: "Defendant might live in Portland eleven months in the year and in Linn county one month—Portland being his usual place of abode. Still the return might be true."

Plaintiff contends that if the decree in No. 667–A was void as to Smallwood, then it was void as to

Ehrlich, the other defendant, citing Gray vs. Larimore, 4 Saw. 644. It is sufficient to answer that the decree contained a personal judgment against Ehrlich upon the notes which he had executed in favor of the plaintiff, Jenne; that there was personal service upon Ehrlich in Alaska; that he made no appearance; and that Ehrlich is not a party to this suit.

These are the only cases cited by counsel in his brief.

Plaintiff further contends that the judgment was void because there was no proof of the mailing of a copy of the summons and complaint to Smallwood on file at the time that the judgment was entered. Even if there was no such proof ever filed, it would not affect the question of jurisdiction, especially upon a collateral attack; *but* the proof *was filed* long before the plaintiff Von Arx ever obtained any interest in the property.

Cases cited by Honorable Judge Lyons in his decision (Rec. 86–92, inclusive), and Ranch vs. Werley, 152 Fed. 509; cases cited by District Judge Wolverton, page 515 of above report.

Plaintiff also complains that the affidavit showing mailing of summons to Smallwood was not filed in the original cause No. 667–A and was filed without notice to Smallwood. The affidavit *was* filed in No. 667–A. (See Rec. 80.) A perusal of the affidavit (Rec. 78, 79, 80), the journal entry of Judge Cushman's order (Rec. 76), and the order of the Court confirming the sale and overruling the objections filed by Von Arx (Rec. 56, 57), clearly shows

that Von Arx had sufficient notice of the filing and that Smallwood, although he had no personal notice, was ably represented by Von Arx and his attorney, J. G. Heid. But that is not all. The record further shows that the plaintiff in this suit in 1910 filed a suit for an injunction against J. M. Jenne, D. A. Sutherland, and A. J. Boone to restrain them from selling this property under the execution against Ehrlich; that the relief was denied and that the decision was in favor of defendants. (Rec. 76.)

The record would now disclose the entire proceedings in cause No. 781–A, Von Arx vs. Jenne et al., were it not for the objections raised by Mr. Cobb and the ruling of the Court in the trial of the case at bar. (Rec. 81.)

The plaintiff Von Arx had *his* day in court long before he commenced this action. He was the plaintiff in cause No. 781–A and he procured the quitclaim deed from Smallwood July 18, 1910, nearly three months after the decision against him by Honorable Judge Cushman, April 30, 1910, and with full knowledge of the filing of the affidavit about which he now complains. (Rec. 76.)

We come now to plaintiff's second objection, page 23 of his Brief: "But even if the judgment in Cause No. 667–A is not void, the proceedings had thereunder did not devest the title of Alexander Smallwood, and the plaintiff having a deed from him was entitled to an instruction to the jury to find for him." It would seem that this objection has been fully answered by Honorable Judge Lyons. (Rec. 92, 93.) However, in case the Court should con-

clude to consider the matter, I refer to the decree of foreclosure (Rec. 37), from which it appears: "Fourth. That the defendants, Edward Ehrlich and Alex. Smallwood, and each of them, and all other persons whomsoever having or claiming any interest in or lien upon any of the property conveyed by the mortgages herein mentioned, or either of them, subsequent to the making and filing of said mortgages, are hereby forever barred and foreclosed of any right, title or interest in said property or any part thereof," and to the deeds from U. S. Marshal to Ehrlich (Rec. 39–46), which show the sale under the first execution and delivery of the certificates of purchase to George Meyers and L. A. Slane, respectively, conveying the property to them. Can counsel seriously contend that the purchasers at said sale under the foreclosure decree did not obtain the title of both Ehrlich and Smallwood by virtue of their certificates of purchase? If they did not, then Smallwood or the plaintiff Von Arx could now maintain an action of ejectment against the purchasers, provided the property had not been redeemed by Ehrlich. Whether Ehrlich had any right to redeem or not, the fact is he did redeem, and thereby, as stated by the Honorable Judge Lyons, he took whatever title was held by the purchasers at the sale under the foreclosure decree, and the action of Ehrlich cannot redound to the benefit of the plaintiff in this case. If Edward Ehrlich, Alex. Smallwood and the plaintiff Von Arx, in their conspiracy to defeat justice and avoid the payment of the notes and mortgages given by Ehrlich in 1902, and which

Smallwood assumed and agreed to pay (Rec. 19, bottom, deed from Ehrlich to Smallwood), had put up the money and redeemed this property in the name of the absconding debtor Smallwood, then their success would have been assured. But, instead of taking that course, it was redeemed by Ehrlich, against whom the mortgagee had a personal judgment. The moment that Ehrlich took the property in his name, the lien of the judgment attached thereto, the same as it would have attached against any other property owned by Ehrlich in the District of Alaska.

The Supreme Court of Oregon has construed the statutes of that State relative to foreclosure of mortgages, redemption, etc., in the following cases:

Settlemire vs. Newsome, 10 Or. 446.
Willis vs. Miller, 31 Pac. 827.
Flanders vs. Aumack, 51 Pac. 447.
Williams vs. Wilson, 70 Pac. 1031.
Kaston vs. Storey, 80 Pac. 217.
Jacobson vs. Lassas, 90 Pac. 904.

The statutes of Oregon concerning the foreclosure of real estate liens are identical with those of Alaska.

THE PLAINTIFF IS NOT ENTITLED TO RECOVER IN THIS ACTION IN ANY EVENT, because

FIRST. The complaint fails to state facts sufficient to constitute a cause of action under chapter 32, secs. 301 and 303, Code of Civil Procedure for Alaska. The statute provides, sec. 301: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover

such possession, with damages for withholding the same, by an action." Sec. 303: "The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered if recovery be had." The complaint does not show a legal estate in land in the plaintiff; it does not state the nature of plaintiff's estate in the land; and the property is not described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

SECOND. Even if the complaint states a cause of action, plaintiff failed to make out a case because he did not prove prior possession either in himself or his grantors.

THIRD. Even though the testimony is sufficient to show prior possession in his grantor, that is not sufficient against defendant A. J. Boone, who was in peaceable possession under color and claim of title.

ARGUMENT.

FIRST. The only allegation in the complaint (Rec. 1) as to the nature of plaintiff's title is, "That the plaintiff and defendant both claim said property under a common source of title, to wit, one Edward Ehrlich." This is not sufficient, when we consider that the land sought to be recovered is the bed of

the sea, tide land on Gastineaux Channel in the Territory of Alaska. The Court will take judicial notice of the fact that Gastineaux Channel is an arm of the sea and navigable water. All the other facts as to the kind of land are alleged in the complaint and admitted in the answer.

In the first place, plaintiff does not allege that Edward Ehrlich ever had title to this tide land, and, in the second place, the laws of the Territory provide expressly that the title to all tide lands located on the shore of navigable water in Alaska is reserved by the United States for the future State that may be carved out of the Territory. See Act May 14, 1898, Sec. 2, entitled, "An Act Extending the Homestead Laws and Providing for Right of Way for Railroads in the District of Alaska and for Other Purposes." 30 Stat. at L. 409, which provides, "That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District."

No citizen of the United States can obtain title to such lands in Alaska. Any person who is in possession of such lands is a trespasser against the Gov-

ernment of the United States. Russian American Packing Co. vs. United States, 199 U. S. 570, 50:314.

Furthermore, when any person who happens to be in possession of such lands abandons his possession and leaves the country and takes up his residence in a foreign country, he cannot afterward, by quitclaim deed, convey a legal estate in such tide lands as will be sufficient in law upon which to base an action of ejectment.

SECOND. Plaintiff fails to show possession in himself or his grantors (the Court will note Record, page 4, that defendant pleads the nature of his own title as follows: "First, Actual possession prior to and at commencement of this action"), and the proof shows that defendant was in possession at the commencement of the action and for eighteen months prior thereto. See testimony of defendant Boone (Rec. 61). The only evidence introduced by plaintiff to show possession was his own testimony. (Rec. 31, 32.) The cross-examination shows clearly that Von Arx did not know whether Ehrlich ever had actual possession of this property or not. I quote from his testimony:

> "Q. You don't know—you are not sure about it, whether the building was built or not?
>
> "A. I can't tell, but should after building connect; they—it is not connected; therefore I don't know, but I believe it was built. That is all."

No one would seriously contend that a person can be in possession of land beneath the ebb and flow of the tide without having some sort of a building on it; and this witness frankly admits that he doesn't

know whether there was a building on the land or not.

THIRD. Even though the proof was sufficient to show possession in Ehrlich in 1905, plaintiff would not be entitled to recover as against the defendant Boone, who was in peaceable possession of the property, because plaintiff has failed to prove any ouster by defendant.

Prior possession is sufficient only as against a mere intruder or wrongdoer.

Board of Regents of University of Arizona vs. Charlebois, 36 Pac. 32.

Sabariego vs. Maverick, 124 U. S. 261, 31:430.

The defendant being a purchaser in good faith for a valid consideration, and in possession of the property, and plaintiff having failed to show a better right thereto, the judgment of the District Court should be affirmed.

Respectfully submitted,

Z. R. CHENEY,

Attorney for Defendant in Error.